(18) (18)

Nos. 90-954; 90-1004

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ROBERT C. RUFO,
SHERIFF OF SUFFOLK COUNTY, ET AL.,
PETITIONERS,
v.
INMATES OF THE SUFFOLK COUNTY JAIL, ET AL.,
RESPONDENTS.

THOMAS C. RAPONE,
COMMISSIONER OF CORRECTION,
PETITIONER,
v.
INMATES OF THE SUFFOLK COUNTY JAIL, ET AL.,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF AMICUS CURIAE
Lawyers' Committee For Civil Rights Under Law of the Boston Bar Association In Support of Respondents

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I. STATEMENT OF INTEREST

The Amicus Lawyers' Committee for Civil Rights Under Law of the Boston Bar Association was founded in 1968 to combat institutional race and national origin discrimination. Since its formation, the Boston Lawyers' Committee has initiated several class action lawsuits that have been resolved by consent decrees or consent judgments. *NAACP* v. *Boston Housing Authority*, Civil Action No. 88-1155-T (D. Mass.) is the most recent example of the Boston Lawyers' Committee's seeking a resolution of the complex societal problem of discrimination through an agreement between the parties rather than a lengthy and costly trial. Wherever possible, the Boston Lawyers' Committee has sought such agreements because they are typically in the interests of all parties. The Boston Lawyers' Committee is, therefore, very concerned with maintaining the integrity of consent decrees and ensuring that public obligors are not freely permitted to renege on obligations they agreed to fulfill.

II. INTRODUCTION AND SUMMARY OF ARGUMENT

For *amicus*, the critical issue in this case is the appropriate standard for modification of consent decrees. The parties and the various *amici* have inundated this Court with proposals for such a standard. These proposals are noteworthy because, taken together, they explicate a number of principles to which *all* parties seem to agree:

1. Consent decrees are an important means for resolving many types of litigation commonly found in the federal courts, including so called "institutional reform" litigation;
2. To be effective, consent decrees must offer a significant measure of finality, both because (a) they are intended to conclude litigation, and (b) they are intended to be binding, as with a contract;
3. Consent decrees nevertheless must be subject to modification upon a sufficient showing of unforeseen, changed circumstances.

The question for this Court is how to strike the balance among these competing concerns. The possible standards span the spectrum between the "grievous wrong" standard of *United States* v. *Swift & Co.*, 286 U.S. 106 (1932) (*Swift II*), and the standard advocated by petitioner Rapone, the Massachusetts Commissioner of Correction, who argues that modification is *required*, if (1) there is no longer any constitutional violation, or (2) "changed circumstances" and the "public interest" indicate that the consent decree has been rendered "inefficient and inequitable." Br. of Petitioner Thomas C. Rapone, Commissioner of Correction ("Commissioner's Br.") at 26, 30.

Amicus urges the Court to adopt a standard which requires a substantial threshold showing of unforeseen and unforseeable

changed circumstances before the provisions of a consent decree, once entered voluntarily by the parties, may be set aside. Consent decrees are too important a means of resolving federal court litigation, finally and short of trial, to render them ineffective by adoption of a lenient standard for modification. Important federal interests in settlement, finality, and the integrity of the judicial process support a more exacting standard. Parties to a consent decree should not be encouraged to enter into such decrees in hopes of merely *postponing* litigation on the merits until a more opportune and politically expedient time. Yet that is precisely the outcome which will result from the standards promoted by petitioners.

Application of a standard requiring a strict threshold showing of unforeseen and unforeseeable changed circumstances will result in affirmance of the District Court here. That court considered each of the offerings of petitioners and concluded, as a *factual* matter, that they did not justify excusing petitioners from a deal they struck in 1979 and again in 1985. The District Court was confronted with petitioners who had managed to postpone for 17 years the closing of a jail whose conditions were found unconstitutional, by promising construction of a new jail which provided certain negotiated conditions of confinement — principal among which was that prisoners would be housed one to a cell. It was not error for the District Court to conclude, after weighing this record against petitioners' assertions of an important change in law which had occurred 11 years before, and an important "unforeseen circumstance" of increased prisoner population which had first been addressed in modification proceedings five years before, that those assertions did not justify the setting aside of a negotiated bargain which had been intended to conclude litigation and from which petitioners had realized great benefits.

Finally, the Court should explicitly reject the suggestion of the Commissioner of Correction that modification is required

once it is shown that the constitutional violation has abated. Most injunctions immediately bring the party enjoined into compliance with the law, but the injunction nevertheless remains in place because of legitimate concerns that absent the injunction the enjoined conduct may recur. The Commissioner's suggestion is not supported by this Court's decision in *Board of Educ. of Oklahoma City* v. *Dowell*, 111 S.Ct 630 (1991), ignores the traditional role of the injunction, and would expose injunctions in institutional reform litigation — even those entered by consent — to perpetual collateral attack. The decision below accordingly should be affirmed.

III. ARGUMENT

A. Three Important Principles Of Federal Law Support Adoption Of A Strict Standard For Modification

The importance of the issue before the Court can be illustrated by examining the position of the petitioner Commissioner of Correction. The Commissioner advances two propositions: (1) that in institutional reform litigation such as this, a consent decree *must* be modified where the constitutional violation no longer exists, and (2) that a consent decree *must* be modified where the government defendant can produce some evidence of changed circumstances, and can demonstrate an important enough public interest to render continuing enforcement of the decree "inequitable."

The simplicity of the Commissioner's arguments is alarming, in that he fails to recognize that adoption of such a standard would immediately call into question the validity of literally thousands of final judgments now entered in the federal courts. Yet the Commissioner's arguments are echoed, to an only

slightly lesser degree, in all the briefs seeking reversal of the judgment below.[1] These arguments suffer from very basic fallacies, in that they fail to recognize at least three important and prevalent principles of federal law — the federal interests in promoting settlement, in finality of judgments, and in the integrity of litigation proceedings.

1. *Consent Decrees Are An Important Means Of Settling Litigation, And Enforcement Of Such Decrees Is Accordingly Important*

It is perhaps belaboring the obvious to point out that there are important federal interests in settling litigation in the federal courts short of trial. This federal interest has been recognized by this Court on numerous occasions, recently in *Evans* v. *Jeff D.*, 475 U.S. 717, 732-734 (1986), where the Court discussed the benefits of settlement in the context of civil rights litigation, and noted that policies which disserve settlement will "forc[e] more cases to trial, unnecessarily burdening the judicial system, and disserving civil rights litigants." *See also* 475 U.S. at 767 n.15 (Brennan, J., dissenting) ("[b]y lessening docket congestion, settlements make it possible for the judicial system to operate more efficiently and more fairly while affording plaintiff an opportunity to obtain relief at an earlier time."); *Marek* v. *Chesny*, 473 U.S. 1, 10 (1985). The interest has been recognized in numerous decisions in the lower courts as well. *See, e.g., Newton* v. *A.C.&S., Inc.*, 918 F.2d 1121,

[1] Ironically, the Commissioner did not make any of these arguments before the District Court. The Commissioner did not take a position with respect to the Sheriff's requested modification, and chose not to file a brief.

The other petitioner, the Sheriff of Suffolk County, does not argue that a consent decree in institutional reform litigation must be modified where the consitutional violation no longer exists. The Sheriff's proposed test, however, suffers from the same fallacies as the Commissioner's.

1129 (3d Cir. 1990); *Armstrong* v. *Board of School Directors*, 616 F.2d 305, 312 (7th Cir. 1980).

This Court is well aware of the burgeoning case loads of the federal courts, and has repeatedly confirmed its interest in alternative means for resolving these disputes. *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985) (noting the "emphatic federal policy in favor of arbitral dispute resolution"). Settlement is the most time honored and the most prevalent of the means of resolving litigation.

When litigation seeks injunctive relief, the mechanism for settling that litigation is a consent decree. Not surprisingly, the use of consent decrees to resolve federal court litigation is exceedingly common. According to statistics maintained by the Administrative Office of the United States Courts, 8,451 cases, or roughly 4% of yearly case dispositions, were resolved by consent decree in the federal courts during the 12 months ended June 30, 1990. Statistics have been reported indicating that 75% of all anti-trust litigation brought by the Federal Trade Commission, and 90% of all Securities and Exchange Commission enforcement proceedings, are resolved by consent decree. Jost, *From* Swift *To* Stotts *And Beyond*: *Modification Of Injunctions In The Federal Courts*, 64 Tex. L. Rev. 1101, 1102-03 (1986). In complex injunctive litigation such as institutional reform cases, consent decrees offer the additional benefit of allowing the parties — who have a much better grasp than the court of their respective needs — to compose the details of the injunction, thereby promoting efficiency while minimizing court intervention.

If settlement by consent decree is to be encouraged, consent decrees must be readily enforceable according to their terms. It is commonly stated that a consent decree is a hybrid, exhibiting characteristics of both contract and judicial order. *Local 93, Int'l Ass'n of Firefighters* v. *City of Cleveland*, 478 U.S. 501, 519 (1986). As with any contract or judicial order, the

consent decree draws its legitimacy from its ability to be enforced in court. The parties conduct a negotiation leading to a consensual bargain, and they do so on the understanding (as with any contract or order) that failure to adhere to the terms to which they have agreed will result in court intervention to force them to do so.

These concerns plainly support strict, rather than lenient, enforcement of consent decrees, and accordingly, a spartan attitude toward modification. In the words of Judge Posner, "[n]o one will sign a consent decree if the other party is free to walk away from it." *Duran* v. *Elrod*, 760 F.2d 756, 760 (7th Cir. 1985). No doubt these same concerns animated Justice Cardozo's statement in *Swift II*, 286 U.S. at 120:

> What was then solemnly adjudged as a final composition of an historic litigation will not lightly be undone at the suit of the offenders, and the composition held for nothing.

2. *The Important Principle Of Finality Dictates That Modification Should Not Lightly Be Granted*

A second important federal principle which supports a strict standard for modification is the interest in finality of judgments. Often lost in the debate about the need for modification of consent decrees is that such decrees are regarded as final adjudications of the controversy before the court. Principles of *res judicata* and collateral estoppel reflect the importance of repose in our system, and dictate that claims resolved in litigation not be relitigated. The interests of finality embodied in *res judicata* principles serve to "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and by preventing inconsistent decisions, encourage reliance on adjudication." *United States* v. *Mendoza*, 464 U.S. 154, 158 (1984) (quoting *Allen* v. *McCurry*, 449 U.S. 90, 94 (1980)).

This Court's concern for and interest in finality has been recognized time and again, from *Southern Pacific R.R.* v. *United States*, 168 U.S. 1, 49 (1897) to its decision this term in *McCleskey* v. *Zant*, 111 S.Ct. 1454 (1991). This Court held in *Southern Pacific* that the general rule of *res judicata* "is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination." 168 U.S. at 49. Although *McCleskey* concerned the appropriate standard to apply in evaluating successive habeas petitions, it too recognized that "collateral litigation places a heavy burden on scarce federal judicial resources, and threatens the capacity of the system to resolve primary disputes." 111 S. Ct. at 1469.

These same concerns about finality of judgments are codified in Rule 60 of the Federal Rules of Civil Procedure. The Rule details only six reasons for relief from a final judgment or order, and places strict time constraints on several of these. Cases construing Rule 60 have repeatedly emphasized the extraordinary nature of the relief, and the extraordinary showing required for such relief. See generally *Klapprott* v. *United States*, 335 U.S. 601 (1949). Thus, in *Ackermann* v. *United States*, 340 U.S. 193 (1950) this Court rejected the petitioner's request under Rule 60(b)(6) to be relieved from a denaturalization order noting that petitioner had chosen not to appeal. The Court stated, in language equally applicable here: "the choice was a risk, but calculated and deliberate and as follows a free choice. . . . There must be an end to litigation some day, and free, calculated, deliberate choices are not to be relieved from." *Id.* at 198.

These constructions of Rule 60, which are echoed in cases applying Rule 60(b)(5), reinforce the importance of finality of judgments and support a strict standard in addressing modification requests.

3. *Concerns About The Integrity Of Pleading In The Federal Courts Support A Strict Standard For Modification*

Finally, concerns about the integrity of pleadings and representations made during litigation support a strict standard for modification. These concerns are reflected in a broad body of case law which has evolved fairly recently under the heading of "judicial estoppel" — the notion that a party who makes representations to the Court, and succeeds in litigation by virtue of those representations, cannot thereafter adopt a contrary position. *See generally Patriot Cinemas, Inc.* v. *General Cinema Corp.*, 834 F.2d 208, 212 (1st Cir. 1987) (citing cases). The principle was first enunciated by this Court, however, as long ago as 1895:

> It may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of a party who has acquiesced in the position formally taken by him.

Davis v. *Wakelee*, 156 U.S. 680, 689 (1895). *See also Callanan Road Improv. Co.* v. *United States*, 345 U.S. 507, 513 (1953).

In any case where a party asks a court to modify a consent decree, it is to some degree reneging on a representation previously made to the court that it would comply with the provision it now seeks to change. Doubtless there are various degrees to which such a party is "reneging," as opposed merely to asking for a change in light of unforeseen circumstances. But the above principle is at issue in each instance. One of the questions for the court is whether the party seeking modification, in originally representing to the court that it agreed to

the provisions of the consent decree and thereafter obtaining benefits from that decree, really used the representation (which he now seeks to avoid) to gain an unfair benefit. In this case, for example, respondents might well ask whether petitioners, having obtained a 17-year stay of the closing of the old jail, are only now revealing their true intention not to abide by their part of the bargain. These "judicial estoppel" concerns accordingly also teach that a representation to a court that a party is willing to undertake the obligations of that court's order should not be easily set aside.

4. *The Above Principles Support A Strict Standard For Modification*

Taken jointly or severally, the above principles support adoption of a strict, as opposed to *laissez faire*, standard for modification of consent decrees. The more relaxed the standard, the more parties will be encouraged to enter into consent decrees in hopes of simply putting off until another day actual litigation of disputed issues. Parties should not be encouraged to believe that a settlement sanctified by a final judgment and the terms of a contract can be lightly undone. Nor should parties be encouraged to represent their agreement to the court under circumstances where they feel free to act, down the road, as if they had their fingers crossed behind their back.

Amicus does not minimize the concerns which have lead several courts and commentators to argue, particularly in the context of institutional reform litigation, for a more relaxed modification standard than that enunciated in *Swift II*. But any relaxation must be carefully circumscribed, in light of the above principles. As Judge Mikva stated in affirming the denial of a modification of a similar consent decree in *Twelve John Does* v. *District Of Columbia*, 861 F.2d 295, 298 (D.C. Cir. 1988):

> Modification is an extraordinary remedy, as would be any device which allows a party — even a municipality — to escape commitments voluntarily made and solemnized by a Court decree.

Amicus accordingly suggests the following test:

1. No modification of a consent decree should be allowed unless the party seeking modification first makes a substantial threshold showing of an unforeseen and unforeseeable change in circumstances, either in fact or law, since the consent decree was entered, which change substantially undermines the foundation of the parties' bargain.
2. If such a threshold showing is made, the court should then consider and weigh a number of factors which bear on whether the requested modification (or any other) should be allowed, including (1) whether the modification sought is in derogation of a principal purpose of the decree, (2) whether the moving party has to date complied with the consent decree in good faith, and (3) the extent to which the failure to modify will adversely impact the public interest, including whether the public interest claimed to be at stake can be accommodated by means less inimicable to the decree.

The above standard is more exacting than those advocated by petitioners and many of the commentators, yet it is consistent with prior decisions of this Court, and with most of the lower court decisions on these issues. The requirement of a substantial threshold showing of unforeseen and unforeseeable changed circumstances is critical to advancing the principles of finality, settlement and judicial integrity discussed above.

Once the threshold showing is met, the remaining factors to be balanced are those commonly identified in the decisions

of this Court and the lower courts. Plainly, the extent to which the proposed modification will strike at the heart of the decree is important, and in many instances it will be outcome determinative. Complete evisceration of the purpose of a decree requires an extreme showing, whereas more marginal changes will require a lesser showing. The party's good faith compliance is also relevant, in particular because it will shed light on the legitimacy of claims of changed circumstances and asserted adverse effects on the public interest. The public interest also must be considered, as it traditionally has been in framing decrees in the first instance. *See e.g.*, *Hecht Co.* v. *Bowles*, 321 U.S. 321 (1944). But a court should view claims of adverse impact on the public interest with a healthy skepticism. It should be remembered that the government defendant had ample opportunity to consider the public interest *before* it consented to the decree. And in this regard, a court's skepticism concerning the asserted public interest should be heightened where alternative, less intrusive means of accommodating that interest are readily available but not pursued.

The changed circumstances condition was found to be met, as a factual matter, in most instances where modification has been granted.[2] Thus, in *New York State Association For Retarded Children* v. *Carey*, 706 F.2d 956 (2d Cir. 1983), *cert. denied*, 464 U.S. 915 (1983), where Judge Friendly ruled that modification was appropriate, the Court emphasized that experience in administering the decree had shown that the proposed modification to allow mental hospital patients to be reassigned to facilities larger than those ordered by the consent

[2] Some cases in which modification has been allowed have involved language in the decree expressly providing methods for modification. *United States* v. *United Shoe Machinery Corp.*, 391 U.S. 244 (1968); *Plyler* v. *Evatt*, 846 F.2d 208, 211 (4th Cir.), *cert. denied*, 488 U.S. 897 (1988). Such provisions are to be encouraged, since they will force the parties or the court to focus or define those circumstances that would cause them to revisit the remedy. Those cases should not be viewed as ordinary "modification" cases.

decree was "essential" to attaining the decree's principal goal of emptying the mental hospital. Similarly, in *Duran* v. *Elrod*, Judge Posner cited as changed circumstances justifying a very limited modification the facts that the City of Chicago had come within seven weeks of fulfilling its obligations under the consent decree, and that due to the consent decree, the Department of Corrections had begun releasing felons accused of violent crimes back into the general population.

While allowing modification of decrees, however, the cases nevertheless recognize the need to scrutinize such requests carefully. Judge Posner, in particular, identifies the need to hold government defendants to representations they have made. In *Duran*, Judge Posner states that the County's limited request for seven weeks of grace was "not unreasonable." He goes on to add, however:

> The county promised emphatically at the argument of this appeal that it would not request a further extension (and we add: it had better not renege).

Duran, 760 F.2d at 761.

The *Duran* court's emphasis on holding the County to its obligation no doubt would be echoed by every plaintiff in institutional reform litigation who is faced, as respondents are here, with a motion to modify a consent decree with regard to a term carefully negotiated and agreed upon. The sentiment that a party to a contract "had better not renege" is a familiar sentiment to anyone who has ever had contractual dealings. The standard adopted by this Court with respect to modification must advise all those associated with consent decrees that they should regard their obligations solemnly, and "get it right the first time."

The need to enforce consent decrees according to their terms is recognized in a similarly backhanded — but powerful — fashion in the brief of the Solicitor General. Consistently with

many of the commentators and the lower courts, the Solicitor General's brief advocates "a less stringent standard than that applied in *Swift* . . . ." Brief of the United States as Amicus Curiae, at 8. But the Solicitor General could not avoid expressing reservations about a "flexible" standard when the federal government's interests in finality and the sanctity of contract are at issue. Thus, in a footnote, the Solicitor General is compelled to argue that:

> On the other hand, in litigation brought by the federal government against the state or local government concerns arising from the supremacy clause may justify the application of a different standard for the review of requests by defendants for the modification of consent decrees.

Id. at 28 n.17.

The Solicitor General's hedge is an apt illustration of the general concerns favoring a spartan attitude toward modification. This Court has received numerous briefs from parties who are often on the wrong end of a consent decree, and who accordingly are advocating relaxed standards for modification of those decrees. But the reasons urged for such a relaxed standard are based less upon principle, and more upon whose ox is being gored. The Solicitor General's footnote demonstrates this emphatically. *Amicus* suggests that there should be no difference between litigation brought by individuals who, as here, have had their constitutional rights violated by a state or local government, and litigation brought by the federal government seeking to redress similar violations. In each case, if a consent decree is entered it is because the state or local government has determined that relief is appropriate, has stated that it will undertake the relief set forth in the decree, and has affirmed that undertaking by signing a contract which has

become a court order. The interest of the plaintiffs in seeing that decree enforced according to its terms, and the potential interest of the state or local government arising out of alleged changed circumstances, do not depend on whether the plaintiff is a private individual or the federal government. The federal government's advocacy for a strict standard where it is the plaintiff (and a more relaxed standard if it is a defendant) thus supports the respondents' position here.

B. Upon Application Of The Proper Modification Standard, The Decision Of The Court of Appeals Should Be Affirmed

1. *The Standard Of Review Of A Decision On A Request To Modify A Consent Decree Should Be Especially Deferential*

Applying the modification standards set forth above, the decision here should be affirmed. To begin, *amicus* notes that there are several good reasons why courts should particularly defer to decisions of the district court with respect to motions for modification. The very fact that institutional reform litigation generally involves affirmative relief reaching far into the future assures that in most cases the district court will be intimately familiar with the history of the litigation, including the record established prior to entry of the consent decree, the basis for the consent decree, and the history of compliance with the consent decree. In many cases the district court may even have been involved in the negotiations as to the consent decree's terms, or subsequent construction of those terms. There, accordingly, is no individual better suited to evaluate whether circumstances have truly changed than the district judge. Nor is there a person better suited to evaluate whether the moving party has acted in good faith, or whether the mod-

ification sought will eviscerate (or effectuate) a principal purpose of the decree.

This Court has often emphasized the general obligation of appellate courts to defer to the fact finding of district courts, *see Anderson* v. *Bessemer City*, 470 U.S. 564 (1985), and to the discretion exercised by district courts in granting or denying injunctive relief. *See Lemon* v. *Kurtzman*, 411 U.S. 192, 200 (1973) (*Lemon II*). In the context of a motion to modify a consent decree, these general principles of deference to trial courts are appreciably enhanced by the likely fact that the district court has been involved for many years in administration of the decree. *Cf. Hutto* v. *Finney*, 437 U.S. 678, 688 (1978) ("[T]he exercise of discretion is entitled to special deference because of the trial judge's years of experience with the problem at hand . . . .") Plainly, the decision of the trial court on a motion for modification must be afforded great deference. *See, e.g., Ruiz* v. *Lynaugh*, 811 F.2d 856, 861 (5th Cir. 1987) ("we note that a district court's decision to modify a consent decree in an ongoing institutional reform case is committed to that court's discretion because it is intimately involved in the often complex process of institutional reformation.").

As the District Court found, the petitioner's showing in support of modification here failed even to approximate the necessary substantial threshold showing of unforeseen and unforeseeable changed circumstances. Petitioners offered two arguments below: (1) that *Bell* v. *Wolfish*, 441 U.S. 520 (1979), worked an unforeseen change in the law, and (2) that there had been a radical and unforeseen increase in pre-trial detainees in Suffolk County since the consent decree was entered.

The argument based on *Bell* v. *Wolfish* was rightfully rejected because the "change" in law — if indeed there was one — was obviously foreseeable, and most likely was a driving force in the thinking of the parties when they entered into the

consent decree. *Bell* was actually under consideration by this Court at the time the consent decree was entered. In settling the case before *Bell* was decided, the parties obviously evaluated the relative risks that the outcome of *Bell* might affect their ability to obtain the result they sought if they litigated the case to conclusion. Put another way, the Sheriff of Suffolk County no doubt considered the possibility that *Bell* might hold unequivocally that conditions of confinement such as those in the Suffolk County jail did not violate the Constitution, and nevertheless chose to settle the case before *Bell* was decided. The Sheriff could have negotiated for a provision in the decree which would have relieved him of his responsibilities if the decision in *Bell* had been favorable, but either he chose not to negotiate, or was unable to bargain for such a provision. Having made that decision and avoided to some degree the risk of an adverse outcome in *Bell*, the Sheriff should not now be allowed to work both ends of the street, by obtaining the benefits of a positive decision through a motion for modification.

This is not a case, as in *System Federation No. 91* v. *Wright*, 364 U.S. 642 (1961), where there has been such a clear change in law on the precise issue litigated under the decree that justice requires that the decree be altered or vacated. As Judge Keeton noted, *Bell* certainly did not overrule prior precedent indicating that in some circumstances double bunking in prisons could create an unconstitutional condition. *See* Sheriff 's Petition for Certiorari, at 10a. In his article on modification of injunctions, Professor Jost addressed this issue with remarkable prescience:

> For example, a class of prisoners may have extracted from the state a commitment to abolish double celling in exchange for abandoning other claims regarding prison overcrowding or security. A subsequent Supreme Court decision holding double celling con-

> stitutional in some circumstances does not justify modification of the decree to deprive the prisoners of this hard-won benefit. Unless changes in the law render the original decree illegal, modification of consent decrees to conform to legal changes contemplated by the parties in negotiating the decree should rarely be granted.

Jost, 64 Tex. L. Rev. at 1136.

Petitioners' argument concerning changes in the population of the Suffolk County jail is similarly flawed. The facts concerning this issue, and its relationship to the consent decree, are set forth in detail in respondents' brief, and *amicus* will not burden the Court by repeating them here. The critical point is that single celling was an important premise of the relief respondents sought by the initial decree in 1979, and the importance of single celling was reaffirmed in subsequent litigation concerning modification of the consent decree to allow for the building of a larger jail *in 1985*. That litigation took place before Judge Keeton, and the important portion of the court's order stating that the proposed jail could be enlarged to any capacity "*provided that single cell occupancy is maintained*," was a provision proposed *jointly* by petitioners and respondents. Joint Appendix 107 (emphasis in part in original). For petitioners to argue now that single celling was not a principal purpose of the decree is disingenuous — a fact which likely was not lost on Judge Keeton in denying the motion to modify.[3]

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[3] Perhaps to avoid this factual difficulty, petitioner Sheriff suggests that in assessing a request to modify the court should consider whether the modification will affect "the purpose of the consent decree, *as defined by the constitutional, statutory or regulatory provision that occasioned the original intervention, as that provision may have been further defined or clarified by subsequent judicial*

Even if petitioners could demonstrate the substantial threshold showing required, petitioners lose under a balancing of interests. In considering petitioners' request, Judge Keeton also considered the petitioners' good faith, and whether the proposed modification was in derogation of one of the principal purposes of the decree. Judge Keeton specifically found that the proposed modification would violate one of the decree's principal purposes — to secure "a separate cell for each detainee." Sheriff's Petition for Certiorari, at 12a. This is a factual finding which should be accorded deference both by the Court of Appeals and this Court. And although Judge Keeton made no specific findings concerning the Sheriff's good faith, the record abounds with facts, reflected in Judge Keeton's memorandum of decision, indicating a lack of same. *Cf.* Sheriff's Petition for Certiorari, at 12a ("Defendants' agreement in this case was a firm one, and not merely an agreement to comply with the decree if it was not too difficult to do so . . . .")

As for the public interest, *amicus* does not minimize the public interest in maintaining sufficient jail space to house all those pretrial detainees who are required to be incarcerated, so as not to release them prematurely. But those concerns existed as well in 1979, and in 1985. And as respondent's brief makes clear, the factual circumstances regarding the sufficiency of space are no different, and little more acute, than they were in 1985. Moreover, even assuming that circumstances have materially changed since that time, this is not a case,

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decisions." Brief of Petitioner Robert C. Rufo, Sheriff of Suffolk County, at 12 (emphasis supplied).

Thus, the Sheriff suggests that in addressing whether the modification will derogate the decree's purpose, the "purpose" is not to be derived from what the parties intended, but from a subsequent evaluation by the court of the constitutional provisions at issue. Such a test would eviscerate all the contractual aspects of the consent decree, and would allow the government defendant to reopen the decree's "purpose" for review whenever it apeared opportune to do so.

like *Duran*, where a very limited modification will avoid serious public safety implications. As respondents' brief makes clear, here petitioners are proposing a radical and permanent change in the consent decree under circumstances where much less intrusive means for protecting the asserted public interest suggest themselves. Under a balancing of interests, Judge Keeton's rejection of the proposed modification was eminently reasonable.[4]

C. A District Court Should Not Be Obligated To Modify Or Vacate A Consent Decree Upon A Finding Of No Further Constitutional Violation

The argument of the Commissioner of Correction that the District Court was obligated to modify or vacate the consent decree upon a finding of no further constitutional violation should be explicitly rejected. The argument is dangerous in its simplicity, since it completely ignores both the nature of a consent decree as a consensual undertaking, and contrary decisions of this Court. The Commissioner's argument has two parts: first, that the modification should have been granted because "there is no constitutional violation at the new jail, nor is there any contention that conditions under the requested modification will violate the Constitution," and second, that the consent decree should be modified because the remedial provision — single celling — which petitioners now seek to revoke is not required by the Constitution, and a consent decree cannot "authorize federal courts to order state and local entities to perform acts not required by the constitution or federal statutes." Commissioner's Brief, at 43. Neither of these arguments have merit.

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[4] Of course, if this Court determines that Judge Keeton did not apply the correct standard in assessing the request for modification, the appropriate result is to remand the case so that Judge Keeton can conduct such further proceedings as are necessary to apply the correct standard.

First, the Commissioner's argument that the remedies provided by the consent decree exceed the court's "equitable jurisdiction," also has two parts — (1) that the court could not have imposed the single celling obligation on the Sheriff if the case had been litigated through trial, and (2) that therefore it could not do so by consent decree. Both arguments are contradicted by the case law.

With respect to whether the remedies provided by a consent decree can exceed those that might be available after trial, that issue was addressed by Justice Brandeis the first time the consent judgment in *Swift* reached this Court. *Swift & Co.* v. *United States*, 276 U.S. 311 (1928) (*Swift I*). Justice Brandeis rejected the notion that the consent decree was void because it allegedly exceeded the scope of equitable remedies which would have been available if the case had been litigated through trial. *Id.* at 328-330. Subsequently, in *Swift II*, Justice Cardozo disposed of the same argument with characteristic insight:

> The combination was to be disintegrated, but relief was not to stop with that. To curb the aggressions of the huge units that would remain, there was to be a check upon their power, even though acting independently, to wage a war of extermination against dealers weaker than themselves. *We do not turn aside to inquire whether some of these restraints upon separate as distinguished from joint action could have been opposed with success if the defendants had offered opposition. Instead, they chose to consent, and the injunction, right or wrong, became the judgment of the Court.*

286 U.S. at 116 (emphasis supplied).

Thus, *Swift* itself rejects the argument that the relief provided by a consent decree must be congruent with the relief available

pursuant to a litigated decree. The interests described above in promoting settlement and finality of judgments dictate that this be so. A consent decree cannot be perpetually subject to collateral attack, and issues concerning the scope of an equity court's remedial powers are not "jurisdictional." Just as the running of an appeal period terminates the power to attack a litigated decree on such issues, a party's consent terminates its power to attack a consent decree.

The principles announced in *Swift* were recently reaffirmed by this Court in *Local 93 Int. Ass'n of Firefighters* v. *City of Cleveland*, 478 U.S. 501, 524-528 (1986), in which a majority of this Court held that the parties to a consent decree can voluntarily accept relief which the district court might not have been able to enter after trial. In *City of Cleveland*, this Court upheld a consent decree which provided for racial quotas in hiring firefighters, arguably in violation of § 706(g) of Title VII. Relying in part on the decisions in *Swift*, the Court held that "to the extent that the consent decree is not otherwise shown to be unlawful, the Court is not barred from entering a consent decree merely because it might lack authority under § 706(g) to do so after trial." *Id.* at 526.

In addition, there is no basis for petitioners' implication that the decree's single celling requirement was unauthorized because it went beyond strictly remedying the constitutional violation claimed by the plaintiffs. This Court addressed such an argument concerning the scope of available equitable remedies in *Milliken* v. *Bradley*, 433 U.S. 267 (1977) (*Milliken II*), which involved a remedial order in a school desegregation case. The petitioners in *Milliken II* argued that the court had exceeded its equitable powers by requiring the adoption of certain remedial educational programs as part of its desegregation plan. This Court rejected the argument, holding that a federal remedial decree is appropriate if it is aimed at eliminating a condition which violates the constitution, *or* it is aimed

at a condition which "*flows from such a violation*." *Id.* at 282 (emphasis supplied). Thus, this Court held that where "a constitutional violation has been found, the remedy does not 'exceed' the violation if the remedy is tailored to cure the '*condition* that offends the Constitution.' " *Id.* (emphasis in original).

Here, of course, the District Court found in 1973 that a number of conditions of the old Suffolk County jail, including double celling, combined to create unconstitutional conditions of confinement. *Inmates of the Suffolk County Jail* v. *Eisenstadt*, 360 F. Supp. 676, 686 (D.Mass. 1973). The findings in that case, coupled with the lengthy history associated with the initial failure to respond to the Court's orders, certainly would have justified a remedy which assured that constitutional violations did not recur. A remedial decree which provides for single celling of inmates under those circumstances "flows from" the constitutional violations found. This Court held as much in *Hutto*, 437 U.S. at 687-88, in which the Court upheld a detailed order intended to remedy Eighth Amendment violations at an Arkansas prison, including a provision limiting the time prisoners could be held in "punitive isolation." The Court stated that "[i]n fashioning a remedy, the District Court had ample authority . . . to address each element contributing to the violation." *Id.*

The Commissioner of Correction's second argument — that the district court was obligated to modify the consent decree because the constitutional violation had ceased — is equally flawed. That argument appears to be based on this Court's recent decision in *Board of Education of Oklahoma City* v. *Dowell*, 111 S.Ct. 630 (1991).

Dowell does not support the Commissioner's contention. In *Dowell*, this Court held that the *Swift* standard did not apply to a motion by a school district to dissolve a litigated desegregation decree. There are three significant features of *Dowell* which render it inapplicable here. First, *Dowell* involved a

litigated decree, not a consent decree. The Oklahoma City Board of Education had never agreed to the particular remedies it was complying with, and so its request to be relieved from the decree did not implicate the federal concerns with promoting settlement and the integrity of federal court process. Second, *Dowell* was a school desegregation case, which this Court emphasized involved peculiar considerations of affirmative remedy, and special concerns about the need for "[l]ocal control over the education of children . . . ." *Id.* at 637. *Dowell* does not hold that *all* institutional reform decrees must ultimately be terminated, and it should not be read to say so.

Third, and perhaps most importantly, in *Dowell* the District Court had made specific findings "that the school board, administration, faculty, support staff, and student body were integrated, and transportation, extracurricular activities and facilities within the district were equal and non-discriminatory," and had further found it "unlikely that the school board would return to its former ways . . . ." *Id.* at 635, 636-637. In short, the district court had found no continuing threat from the discriminatory conduct which had given rise to litigation thirty years before.

Dowell does not hold that an injunction, even a litigated injunction, must be terminated the moment the constitutional violation it was directed at has ceased to exist. Many — indeed, most — injunctions immediately bring the party enjoined into compliance with the law, but the injunction does not thereafter necessarily expire. The injunction instead remains in effect because the fact that the party has once violated the law gives rise to a legitimate concern that he may do it again. In the words of Justice Brandeis in *Swift I*:

> The argument ignores the fact that a suit for an injunction deals primarily, not with past violations, but with threatened future ones; and that an injunction

may issue to prevent future wrong, although no right has yet been violated.

276 U.S. at 326.

Petitioners are not entitled, merely by their nature as government defendants, to be relieved from the burden of an injunction as soon as they can prove compliance with the law. This is particularly true where the decree in question was entered by consent. Indeed, if one accepts petitioners' position, then they would be entitled to litigate (or relitigate) the issue of whether they are (or ever were) in violation of the Constitution at any time they choose. Moreover, since, under petitioners' theory, the only issue in such a challenge to a consent decree would be present compliance with the Constitution, petitioners would not even be required to show changed circumstances since the consent decree entered. The argument thus subjects consent decrees to perpetual exposure to collateral attack; it subverts the entire purpose of settlement and contract; and it has no place in a legal system appropriately concerned with finality.

IV. CONCLUSION

For all the foregoing reasons, *amicus* respectfully requests that this Court affirm the decision of the District Court and the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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